

Defamation and Insults as Criminal Acts Against Trademarks

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ABSTRACT--*The purpose of this study is to determine whether criminal acts of defamation and insults categorized as crimes against trademarks and to find out the legal protection for trademark owners from defamation and insults. This research method use normative juridical as this method examines the concepts, principles of norms and regulations related to the object of research. The results of this study are that criminal acts of defamation and insults cannot be imposed on trademarks because its a legal objects and not legal subjects, but trademark owners who feel disadvantaged can ask for compensation by filing a lawsuit using articles of acts against the law as a form of legal protection.*

Keywords: *trademarks, defamation, intellectual property*

I. INTRODUCTION

The trademark plays a significant role in consumer's decisions to use services or buy products. The better quality of trademark reputation, the more beneficiary for the owner. A trademark is not just a branding name but an identity that distinguishes the quality and criteria[1]that contained an economic values.[2]

The cost for building a well-known trademark is not in small cost, in order for the public to be aware. In January-September 2018 ad spending on television and printed media reached Rp. 114.4 Trillion and in the third quarter grew by 4% with a total expenditure of Rp. 39 Trillion compared to the same period in 2017. For an instance the ad expenses for Traveloka as an e-commerce for booking flights and hotels. The TVCs total aired by Traveloka were 5,345 times. This means that the average per day is 172,419 TVCs (identical to 7.18 times per hour) and costs Rp. 77.18 Billion. Then, the ad for Sampoerna, which dominated TV advertising spending in the first quarter (January-March), was around Rp. 223 Billion (for 3 months). [3]

With the huge amount of expenses, the trademark is one of the assets of a business company. In the 4.0 Industrial Revolution, the media became a means for interaction. In business, this era brought significant changes in the scope of trade. Consumers can easily search for products through cyberspace. Then deliver the concept of product/service review by the public.

However, based on research reports Bing Liu, a computer science professor from the University of Illinois, Chicago, USA revealed that about 30 percent of online reviews for certain products are false.[4] Making it hard to distinguish the truthful reviews from a false one, that the purpose solely to bring down the values of trademark.

In addition, the case of RiusVernandez that started on July 13, 2019 where Vernandes shared a critics post on Garuda Indonesia airline business class menu cards. The photo shows that the menu is made from a handwritten paper.[5]Thus making it interesting to study if a review made harms the producers which impacting the reputation of trademark, or when a review considered detrimental to the trademark owner? Can the trademark owner report the reviewers with the basis of defamation?

II. RESEARCH METHODS

This research uses a normative legal method [6] which studies the concept, norms, principles, theory, and legislations related to the issue. This is a research that focuses on jurisprudence and common norms with statute approach, conceptual approach and case approach.[7] The research was conducted with literature study on legal documents then followed byprescriptive and descriptive analytics.

III. FINDINGS AND DISCUSSION

Trademark is regulated in Law No. 20/2016 on Marks and GeographicalIndications (here after will refer to asTrademark Act), whereas inArticle 1 (1):

“Mark means any sign capable of being represented graphically in the form of drawings, logos, names, words, letters, numerals, colors arrangement, in 2 (two) and/or 3 (three) dimensional shape, sounds, holograms, or combination of 2 (two) or more of those elements to distinguish goods and/or services produced by a person or legal entity in trading goods and/or services.”

A new mark will be protected by the law only if it has been registered with the Ministry of Law and Human Rights, as stipulatedin Article 4 of Trademark Act concerning Terms and Procedures for Registration. Furthermore, the Trademark Act only explains two violations, as follows:

1. The unlawful use of marks in whole (piracy);
2. The unlawful use of a partially similar marks(passing off).

So it can be interpreted that the mark is a legal object. Judicially according to Article 499 of the Civil Code, legal objects are all things that can rise a 'rights' or

become objects of ownership, whereas according to Subekti, the understanding of objects is divided into three:[8]

- a. Broad Object as everything object can rise a 'rights';
- b. Strict Object as material object; and
- c. Object as legal object.

Then what is the meaning of defamation of character? As regulated in Article 310 of the Penal Code and Article 27 (3) of Law No. 11/2008 on Information and Electronic Transactions (here after will refer to as ITE Law). Article 310 paragraph (1) reads:

“The person who intentionally harms someone's honor or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of three hundred rupiahs.”

In Article 310, the crime of defamation has been regulated as a slander (*smaad*) in 310 (1) and libel (*smaadschrift*) in 310 (2). Thus the elements of defamation in 310 are as follows:

- a. The person who intentionally;
- b. Harms someone's honor or reputation;
- c. By charging him/her with a certain fact;
- d. With the obvious intent to give publicity

Moreover, defamation in Article 27 (3) of ITE Law reads:

“Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Documents with contents of affronts and/or defamation.”

Article 310 of the Penal Code and Article 27 (3) of the ITE Law are used together because the Constitutional Court's Ruling on the judicial review of Article 27 (3) of ITE Law states that certain Articles in the Criminal Code are deemed not sufficient to answer legal issues that arise due to cyberspace activities.[9] While Article 27 (3) and Article 45 (1) ITE Law does not sufficiently regulated the concept of electronics defamation. In order to enforce these Articles, the Penal Code, specifically Article 310 and 311 should be taken into accounts. Thus making the elements of electronic defamations as follows:

- a. Every person;
- b. Who intentionally (Related to the element intentionally in point B is if the person does indeed know and want information that contains pollution is spread to damage the honor or good name of person);

- c. Without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Documents;
- d. With contents of affronts and/or defamation
- e. By charging him/her with a certain fact;
- f. With the obvious intent to give publicity

Therefore, the insult and defamation of a mark cannot file a criminal pursuit with Article 310 of the Penal Code and Article 27 of the ITE Law because the elements of criminal defamation are not fulfilled. Thus the proper remedy is to make a civil lawsuit using the basis of 'Unlawful Act' as regulated in Article 1365 of the Civil Code, which reads:

“Every act that violates the law and brings harm to other, obligates the person who caused the loss due to his mistake to compensate the loss.”

In Article 1365 of the Civil Code, the elements of 'Unlawful Act' can be drawn as follows: first, there is an act against the law; second there should be a fault; third should be a loss; and lastly there should be causality between unlawful act and loss. In this context, the owner of the mark, both individuals and legal entities, must be able to prove the form of loss resulting from the act.

IV. CONCLUSION

The crimes of defamation only applicable for legal subject and cannot be imposed on marks as legal objects. However, trademark owners can take legal action by filing a civil lawsuit using the basis of 'unlawful act' provided in Article 1365 of the Civil Code.

REFERENCES

- [1] Dwi Sri R. A., *Penghapusan Merek Terdaftar*, PT. Alumni, Bandung, 2009, Lihat juga Muhammad D. dan R, Djubaedillah, *Hak Kekayaan Intelektual, Sejarah, Teori, danPrakteknya di Indonesia*, Citra AdityaAbadi, Bandung, 1997
- [2] Jisilia Mamahit, *Perlindungan nHukum atas Merek dalam Perdagangan Barang dan Jasa, Lex Privatum*, Volume 1, No. 3, Juli 2013
- [3] <https://www.merdeka.com/teknologi/dua-brand-ini-yang-paling-getol-pasang-iklan-di-tv.html>. Diakses tanggal 2 Januari 2019.
- [4] <https://tirto.id/berapa-besar-pengaruh-ulasan-pembeli-saat-berbelanja-online-b7Gm>. Accessible on 2 January 2020.
- [5] <https://megapolitan.kompas.com/read/2019/07/19/20094841/kronologi-youtuber-rius-vernandes-dilaporkan-garuda-indonesia-hingga?page=all>. Diakses tanggal 2 Januari 2019.
- [6] Muktiv F. ND dan Yulianto A., *Dualisme Penelitian Hukum*, Cetakan 1, PT. Raja GrafindoPersada, Yogyakarta, 2010
- [7] Peter M., *Penelitian Hukum*, Cetakan Ke-7, Kencana, Jakarta, 2005

- [8] Regita A. Mumek, “Hak-Hak Kebendaan Dilihat Dari Aspek Hukum Perdata”, *Lex Administratum*, Volume 5 No. 2, 2017
- [9] Reydi Vridel Awawangi, “Pencemaran Nama Baik Dalam KUHP dan Menurut UU No. 11 Tahun 2008 Tentang Informasidan Transaksi Elektronik”, *Jurnal Lex Crimen*, Volume 3 No. 4, 2014
- [10] Kitab Undang-Undang Hukum Pidana
- [11] Kitab Undang-Undang Hukum Perdata
- [12] Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Trasaksi Elektronik.
- [13] Undang-Undang Nomor 20 Tahun 2016 Tentang Merek dan Indikasi Geografis